

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74 - 2166

United States Court of Appeals

For the Second Circuit.

HOWARD M. WERNER,

Plaintiff - Appellant

against

UNITED STATES OF AMERICA

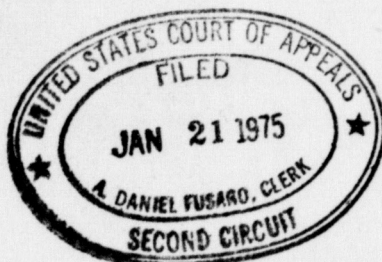
Defendant - Appellee

Plaintiff on Cross-
Complaint

On Appeal from the U. S. District Court
for the District of Connecticut

APPENDIX - PART A

PLEADINGS AND RECORD



To be Argued By

Louis Noah Forman, Esq.,
1540 Broadway,
New York, N. Y. 10036

Joseph Neiman, Esq.,
103 Market Square,
Newington, Conn., 06111
Of Counsel

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

- APPENDIX A -

	<u>PAGE</u>
Complaint	1
Answer	4
Counterclaim	5
Memorandum of Decision	7
Docket	18
Index to Record on Appeal	22

Note: The Transcript of testimony at the trial is
published in Appendix B.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

HOWARD M. WERNER

VS

UNITED STATES OF AMERICA

CIVIL ACTION

No.

COMPLAINT

1. The Plaintiff is Howard M. Werner, citizen of the United States, who resides at 227 Terry Road, West Hartford, Connecticut.

2. The Defendants are Joseph J. Conley, District Director of Internal Revenue Service for the District of Connecticut, and the United States of America.

3. This is an action for the recovery of amounts of money assessed against Plaintiff and collected from Plaintiff as a 100% Penalty for Federal Insurance Contribution Act taxes and Withholding Income Taxes and interest illegally, erroneously and wrongfully assessed against and collected from Plaintiff under color of the Internal Revenue laws of the United States, and is brought under the provisions of Title 28, U. S. Code, Section 1346.

4. The Defendants, acting through a duly authorized representative, caused a notice to be sent to the Plaintiff by letter dated December 11, 1968, to the effect that the Plaintiff might be liable for the payment of a 100% Penalty as a result of the failure of payment of Social Security and Withholding Taxes owed to the Internal Revenue Service by Hugo's Continental Restaurant, Inc., a Connecticut corporation, for the quarters

ending September 30, 1967; December 31, 1967; March 31, 1968; and June 30, 1968.

5. Said notice advised the Plaintiff that as a responsible officer or employee of said Corporation, a 100% Penalty might be assessed against the Plaintiff in the amount of \$11,975.50.

6. The Plaintiff, within ten (10) days of said notice, requested a hearing to protest the proposed assessment in said notice, which hearing was had on December 16, 1968.

7. By letter dated January 16, 1969, the Defendants, acting through a duly authorized representative, advised the Plaintiff that he had the opportunity to protest any assessment of said 100% Penalty, and on February 13, 1969, the Plaintiff did so protest by letter.

8. By letter dated February 24, 1969, the Plaintiff was advised by the Regional Commission of the North-Atlantic Region of the Internal Revenue Service, that the 100% Penalty assessment had been referred thereto, although the Plaintiff had, at no time, requested a review by the Appellate Division of the Regional Commissioner.

9. By letter dated October 19, 1970, the Defendants, acting through a duly authorized representative, advised the Plaintiff that unless payment of said 100% Penalty was paid, together with interest, that enforcement procedures would be instituted for collection of same against the Plaintiff.

10. The Plaintiff, in order to avoid such collection pro-

cedures, on November 9, 1970, paid to the Internal Revenue Service the sum of One Hundred Dollars (\$100.00), and on the same date, filed Form 843 claiming a refund of said sum, as well as an abatement of said 100% Penalty assessment, a copy of which claim is hereto attached.

11. By letter dated January 14, 1971, the Defendants, acting through a duly authorized representative, disallowed the said claim for refund made by the Plaintiff and more than six (6) months has elapsed since the Plaintiff made said claim for refund.

12. The Plaintiff never was nor is now either an employee or an officer of the corporation known as Hugo's Continental Restaurant, Inc., nor was the Plaintiff a director or stockholder of said corporation, nor did the Plaintiff have any relationship to said corporation which would impose liability upon the Plaintiff for the payment of taxes of any nature owed by said corporation or the 100% Penalty assessed as a result of the non-payment of taxes by said corporation.

WHEREFORE, the Plaintiff demands judgment in the amount of One Hundred Dollars (\$100.00), plus such interest and costs as are allowed by law and such other relief as the Court may deem just and equitable.

Dated at West Hartford, Connecticut, this 9th day of December, 1971.

Howard M. Werner
PLAINTIFF PRO SE
924 Farmington Avenue
West Hartford, Connecticut 06107
(203) 233-2104

ANSWER

The Defendant, the United States of America, through its attorney, Stewart H. Jones, United States Attorney for the District of Connecticut, in response to the complaint answers and states as follows:

1. It admits the allegations in paragraph 1.
2. It denies the allegations in paragraph 2, except admits that the defendant is the United States of America.
3. It denies the allegations in paragraph 3, except admits that the jurisdiction of this Court, if any, is pursuant to the provisions of 28 U.S.C., Section 1346(a)(1).
4. It denies the allegations in paragraph 4, except admits that the defendant, acting through a duly authorized representative, caused a notice dated December 11, 1968, to be sent to the plaintiff proposing to assess against him a penalty for the quarters ended September 30, 1967, through June 30, 1968, which notice speaks for itself.
5. It denies the allegations in paragraph 5 and states that said notice speaks for itself.
6. It admits the allegations in paragraph 6.
7. It admits the allegations in paragraph 7.
8. It admits the allegations in paragraph 8, except denies, for lack of knowledge or information sufficient to form a belief as to the truth thereof, the allegation that the plaintiff had, at no time, requested a review by the Appellate Division of the Regional Commissioner.

9. It denies, for lack of knowledge or information sufficient to form a belief as to the truth thereof, the allegations in paragraph 9.

10. It denies the allegations in paragraph 10, except admits that one hundred dollars (\$100) was paid by the plaintiff on November 10, 1970; it admits that the plaintiff filed a Form 843 on November 18, 1970; it denies each and every allegation in said Form 843 unless otherwise expressly admitted herein.

11. It admits the allegations in paragraph 11.

12. It denies the allegations in paragraph 12.

COUNTERCLAIM

As its counterclaim, the United States states:

1. The Commissioner of Internal Revenue has authorized the assertion of a counterclaim in this proceeding and this counterclaim is brought under the direction of the Attorney General of the United States pursuant to 26 U.S.C., Section 7401.

2. On June 22, 1970, the Commissioner of Internal Revenue, through his duly authorized delegate, assessed against the plaintiff, pursuant to 26 U.S.C., Section 6672, a penalty in the amount of \$11,975.50 for the third and fourth quarters of 1967 and the first and second quarters of 1968.

3. On November 10, 1970, the plaintiff paid \$100 of the penalty assessed against him.

4. Despite proper notice and demand of the plaintiff

that the outstanding balance of the assessment, in the amount of \$11,875.50, plus interest, be paid, the same is still unpaid.

WHEREFORE, the United States prays for judgment in the amount of \$11,875.50, plus interest thereon as provided by law and that an order be entered dismissing the complaint with prejudice and granting to the United States its costs.

Stewart H. Jones
United States Attorney

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing answer has this 11th day of February, 1972, been made on plaintiff by mailing a copy thereof addressed to:

Howard M. Werner, Esquire
924 Farmington Avenue
West Hartford, Connecticut 06107

Daniel J. Dinan
Trial Attorney
Department of Justice
Washington, D.C. 20530

FILED
APR 17 4 51 PM '74

CLERK
U.S. DISTRICT COURT
HARTFORD, CONN.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

HOWARD M. WERNER, :
Plaintiff :

v. :

UNITED STATES OF AMERICA, :
Defendant and :
Third-Party Plaintiff : CIVIL NO. 14,783

v. :

FRANK ALESI and ROBERT :
SMITH, :
Third-Party Defendants :

MEMORANDUM OF DECISION

(filed April 17, 4:15 P.m. '74, Clerk, U.S. District Court)

The United States assessed plaintiff for a 100% civil penalty in lieu of federal income taxes withheld from the wages of employees of Hugo's Continental Restaurant, Inc. (Hugo's), but never paid to the United States. The basis of the assessment is 26 U.S.C. § 6672, which makes liable to a 100% civil penalty "Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof" Since plaintiff contends he is not a person subject to such liability within the meaning of § 6672, he paid \$100 of the total assessment of \$11,975.50 and has brought this action

for a refund.^{1/} The United States has counterclaimed for the balance of the assessment, the amount of which is not in dispute. The United States has also filed third party complaints against three other persons who it contends are jointly and severally liable for portions of Hugo's tax arrears and hence are subject to penalty assessments under § 6672. The United States has obtained a default judgment against one of these third party defendants, Ugo Bua, and seeks judgments against the other two third party defendants, Frank Alesi and Robert Smith. The Court has jurisdiction over the entire action under 28 U.S.C. §§ 1340 and 1346(a)(1).

Burden of Proof

"The two elements necessary to make § 6672 applicable to a taxpayer are: (1) the individual person had the authority to direct or control the payment of corporate funds and (2) such a responsible person willfully failed to comply with the tax withholding statutes." Stake v. United States, 347 F.Supp. 823, 826 (D. Minn. 1972). It is well established that in an action for a refund of a penalty assessment under § 6672, the taxpayer has the burden of proving by a preponderance of the evidence "that he was not a person whose duty

1/

The "full payment" rule of Flora v. United States, 357 U.S. 63 (1958), aff'd on reh'g, 362 U.S. 145 (1960), is inapplicable to assessments of civil penalties under § 6672. Psaty v. United States, 442 F.2d 1154, 1159 (3d Cir. 1971); Steele v. United States, 280 F.2d 89, 90-91 (8th Cir. 1960). See also Irving v. Gray, 479 F.2d 20, 24-25, n.6 (2d Cir. 1973).

it was to pay over withholding and social security taxes or that he did not willfully fail to comply with that duty." Melillo v. United States, 244 F.Supp. 323, 326 (E.D. N.Y. 1965). See Lawrence v. United States, 299 F.Supp. 187 (N.D. Tex. 1969). Plaintiff bears this burden of proof both on his claim for a refund and on the Government's counterclaim for the balance still outstanding on the penalty assessment, providing only that the Government offers into evidence the certification of its assessment against plaintiff. Psaty v. United States, 442 F.2d 1154, 1158-1160 (3d Cir. 1971). The certification of assessments against them also places the burden of proof on the third party defendants. Lesser v. United States, 368 F.2d 306, 310 (2d Cir. 1966); Melillo v. United States, supra. In the instant case, the Government put in evidence certifications of assessments against plaintiff and against both of the remaining third party defendants, Alesi and Smith.

Findings of Fact

Viewed from this perspective, the conflicting evidence adduced at trial established the following: plaintiff and two others, Messrs. Kerin and Kaplan, acting as joint venturers provided financial backing for Ugo Bua's purchase of 75 per cent of the stock in Hugo's, which was formerly known as Camelot, Inc. Since the holder of 25 per cent of the stock in Camelot, Inc. has apparently disappeared, the 75 per cent of the Camelot, Inc. stock purchased by Bua conferred

total control over the acquired corporation, i.e., Hugo's, and was treated by Bua and plaintiff as all of the outstanding stock in the corporation. The joint venturers, informally known as KKW, provided operating funds for Hugo's by endorsing Hugo's notes to two banks totalling over \$27,000. KKW also provided Bua personally with funds for his purchase of the business, secured by a mortgage (subsequently foreclosed) on Bua's home. In return for KKW's backing, Bua gave KKW an option to acquire 51 per cent of his stock in Hugo's for \$1,000 at any time within two years from Bua's purchase of Hugo's in March 1967.

At the time Bua acquired Hugo's, the restaurant had over \$29,000 in outstanding liabilities. Despite KKW's optimism about Bua's ability to make the restaurant a success, it continued to operate at a loss. Beginning in May 1967, plaintiff began to involve himself actively in the affairs of Hugo's. Third party defendants Alesi and Smith were brought into the business as entertainers at plaintiff's instigation. As the summer progressed plaintiff became more and more involved in the day-to-day management of Hugo's. Plaintiff's office was near Hugo's, and he would stop in at Hugo's almost every day after work to discuss the business with Bua and to advise Bua on its conduct. Plaintiff had Alesi and Smith assume assistant managerial roles together with Bua and himself in the conduct of the business.

Plaintiff directed an audit to be conducted of Hugo's books in November 1967, in order to determine precisely the

financial condition of Hugo's as of October 31, 1967. The audit revealed that Hugo's was still deeply in debt, and at a meeting to discuss the audit on about November 20, 1967, plaintiff expressed exasperation at the continued drain imposed by Hugo's on the resources of KKW, which apparently had been extending additional credit to Hugo's from time to time since its initial backing of Bua in his acquisition of Hugo's. At plaintiff's direction in the course of this meeting to discuss the audit, the management of Hugo's was reorganized to increase Smith's responsibilities and to decrease Bua's, including Bua's power to write checks on Hugo's account.

The audit showed that Hugo's owed over \$9,000 in withholding taxes through the first ten months in 1967. Bua, an alien, was concerned lest he be deported for failure to pay these taxes. Plaintiff, ostensibly out of concern for Bua and his family, arranged for KKW on November 21, 1967 to give Hugo's about \$11,500 in return for an assignment of Hugo's accounts receivable, which then totalled about \$12,500. At plaintiff's direction Bua and Smith visited the local Internal Revenue Service office, where they were told that they would be contacted later regarding Hugo's back taxes. Ultimately only \$1,300 of the November 21 proceeds of KKW's purchase of Hugo's accounts receivable was paid to the IRS. The balance was at plaintiff's direction applied in satisfaction of other debts, including back state taxes and liquor bills. Plaintiff

was particularly concerned lest unpaid liquor bills should lead to suspension of Hugo's liquor license.

After a disastrous holiday season, Bua was excluded from a meeting of the principals of KKW at Hugo's on New Year's Eve, December 31, 1967. Bua became enraged at this treatment and ejected the principals from the premises. Thereafter Bua reassumed active management of the restaurant, and plaintiff never again entered the premises. However, KKW through plaintiff exerted pressure on Bua to repay KKW for its investment in Hugo's. This led to an agreement between Bua and KKW signed on March 15, 1968, under which Bua acknowledged a debt of \$30,000 to KKW plus the value of as yet uncollected accounts receivable assigned to KKW in November 1967 and by the agreement reassigned to Hugo's. The agreement specified that it was a consolidation of all previous obligations owed by Bua to KKW. KKW agreed not to exercise its option to acquire the stock of Hugo's in consideration for Bua's entering into the agreement, and agreed to release Bua from the option at the time Bua's debt to KKW was paid off. By the terms of the contemporaneous note for \$30,000, Bua was to pay KKW \$200 per week toward the amount owed to KKW. Bua made several such weekly payments thereafter, before the final collapse of Hugo's.

Persons Responsible for the Payment of Taxes

The liability imposed by § 6672 is not confined to persons who are officially responsible as officers or employees

for the payment of corporate taxes. "The term 'person' [as defined in § 6671 for the purposes of § 6672] does include officer and employee, but certainly it does not exclude all others. . . . [T]he section must be construed to include all those so connected with a corporation as to be responsible for the performance of the act in respect of which the violation occurred. [¶] . . . The statute's purpose is to permit the taxing authority to reach those responsible for the corporation's failure to pay the taxes which are owing. It would make little sense to confine liability to those performing the mere mechanical functions of collection and payment when such functions are performed simply in accordance with the executive judgment of others whose duty it is to decide for the corporation in this area." United States v. Graham, 309 F.2d 210, 212 (9th Cir. 1962). The person responsible for the payment of taxes under §§ 6671 and 6672 is the person who "had the final word as to what bills should or should not be paid, and when," Wilson v. United States, 250 F.2d 312, 316 (9th Cir. 1958), a person "so connected with a business as to be in a position to exercise full authority with respect to its financial affairs." Melillo v. United States, supra, 244 F.Supp. at 327.

Under this standard, the evidence established plaintiff as a person responsible for Hugo's payment of withholding taxes during the third and fourth quarters of 1967. Plaintiff was clearly the man in ultimate control of Hugo's during this

period; as the only member of KKW actively monitoring Hugo's affairs, plaintiff had great influence over the putative owner of Hugo's, influence which plaintiff was not loath to exercise. Plaintiff's lack of any official connection (other than creditor) to Hugo's was largely illusory. KKW was possessed of an option to buy a majority interest in Hugo's at any time during this period, for a mere \$1,000. Bua could have been under no misapprehension that resistance on his part to plaintiff's "advice" could easily result in his loss of formal control over Hugo's--having already sunken nearly \$30,000 into Hugo's, KKW could be expected readily to exercise its \$1,000 option in order to protect its investment by assuming direct management of the business, so long as the business was worth saving. This point of worthlessness had apparently been reached by the time of Bua's New Year's revolution. KKW did not thereafter exercise its option, and plaintiff refrained from further participation in the day-to-day affairs of Hugo's. With Bua intransigent and the business failing, the further investment of even the minimal option price no doubt appeared futile at that point, and KKW assumed the more passive role of a mere creditor.

The Court does not feel that § 6672 was intended to reach one who as a bona fide creditor, and not as the power behind a puppet corporation, importunes a failing corporation to pay off its debts. Obviously creditors can and do wield considerable power over an ailing business through the threat

of draconian collection measures, but so long as creditors limit such pressure tactics to inducing payment of what is owed them, and do not seek to take effective control of the debtor in order to improve the debtor's ability to pay, then the mere fact of an obligation owed to the creditor and the creditor's forceful demand for payment, together with the creditor's capacity through threat of collection to make the debtor dance to his tune, ought not to render the creditor a person responsible for the debtor's payment of taxes within the meaning of § 6672. Only he who actually calls the tune should be held accountable to the piper. Accordingly, while it is clear that plaintiff and KKW still exercised considerable influence over Bua, insofar as Bua was induced to sign the consolidated loan agreement of March 15, 1968 and to make payments thereunder, plaintiff was by virtue of his acquiescence in Bua's managerial volte-face no longer a person responsible under § 6672 for Hugo's tax payments.

Willfulness

It remains for the Court to determine the willfulness of plaintiff's failure to ensure that Hugo's paid its taxes for the last two quarters of 1967. It is sufficient evidence of willfulness for a person responsible for the payment of taxes to have "voluntarily, consciously, and intentionally preferred other creditors of the corporation over the United States." Spivak v. United States, 370 F.2d 612, 615 (2d Cir. 1967), cert denied, 387 U.S. 908. Willful action under § 6672

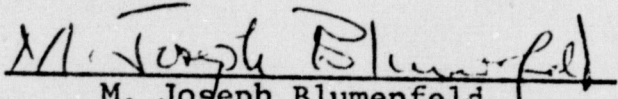
requires merely "voluntary, conscious and intentional--as opposed to accidental--decisions not to remit funds properly withheld to the Government. [Citations omitted.] Liability does not depend upon the presence of bad motive or the specific intent to defraud the Government or deprive it of revenue." Monday v. United States, 421 F.2d 1210, 1216 (7th Cir. 1970), cert. denied, 400 U.S. 821. "[T]he financial condition of the business or the demands of creditors" are not proper factors in determining the willfulness under § 6672 of a failure to pay taxes. Id. "The desire to continue in business is not justification for . . . preferring other creditors" under the expansive civil, as opposed to criminal, standard of willfulness in failing to pay taxes. Stake v. United States, supra, 347 F.Supp. at 827. Since it is evident that, from the November 1967 audit, plaintiff knew Hugo's was seriously delinquent in its payment of withholding taxes, and yet plaintiff directed the great bulk of the money paid to Hugo's by KKW for its accounts receivable to be paid to creditors other than the United States, it follows that plaintiff's failure to ensure full payment of the taxes withheld during the third and fourth quarters of 1967 was willful.

Plaintiff's complaint against the United States is dismissed. Judgment may enter for the United States on its counterclaim against plaintiff for \$9,045.59, plus statutory interest thereon, that amount being the unpaid balance of the amount assessed against plaintiff for Hugo's failure to pay

taxes in the third and fourth quarters of 1967. Judgment may enter dismissing the balance of the United States' counterclaim against plaintiff, i.e., \$2,829.91, the amount assessed against plaintiff for Hugo's failure to pay taxes during the first and second quarters of 1968. The United States' complaints against third party defendants Alesi and Smith are dismissed, the Court finding that Alesi and Smith lacked sufficient authority within the management of Hugo's to be persons responsible for the payment of federal withholding taxes. Judgment against the United States in the amount of \$601.61, without interest, may accordingly enter for third party defendant Alesi on his counterclaim against the United States for that amount, which was collected through a levy on Alesi's assets and applied against the 100% penalty assessed against Alesi.

SO ORDERED.

Dated at Hartford, Connecticut, this 17th day of April, 1974.


M. Joseph Blumenfeld
United States District Judge

CIVIL DOCKET

M. Joseph Blumenfeld

14783

UNITED STATES DISTRICT COURT

Jury demand date:

C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
HOWARD M. WERNER	For plaintiff:
VS	Howard M. Werner, Esq. 924 Farmington Avenue West Hartford, Conn. 06107
JOSEPH J. CONLEY, DISTRICT DIRECTOR, INTERNAL REVENUE SERVICE and UNITED STATES OF AMERICA	Martin S. Stillman P. O. Box 11-413 Newington, Conn. 06111
VS.	
HUGO-BWA, FRANK ALESI and ROBERT SMITH	
Third-Party Defendants	
For defendant:	For defendant:
Joseph J. Gadarowski (For: Frank Alesi)	Daniel Dinan, Esq.
Joseph Neiman & Gadarowski	Assistant Chief
103 Market Square - P. O. Box 11-344	Refund Trial Section #1
Newington, Conn. 06111	Tax Div. Dept. of Justice
	Washington, D. C. 20530
	Stewart H. Jones
	Henry S. Cohn
	450 Main Street
	Hartford, Conn.
	Joseph Neiman (For Robert J. Smith)
	103 Market Square
	Newington, Conn. 06111
	(Neiman & Gadarowski)

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
S. 5 mailed	Clerk	1971			
		12/14	K.K.W.	\$15.00	
			Enterprises		
S. 6 mailed	Marshal	12/17	Deposit:		15 00
		"	G.F.100869		
		1974			
asis of Action: Action for	Docket fee	5/17	Joseph	5 00	
covery of money alleged	Witness fees		Neiman		
have been illegally,	Depositions	5/22	(Appeal)		
roneously and wrongfully			Deposit:		
tion are not assessed against		"	G.F.100869		5 00
d collected from Plaintiff					
defendant. \$100.00					

DATE	PROCEEDINGS	ROBERT SMITH	Date Order or Judgment Noted
7/2			
7/31	Notice to take Depositions of Robert Smith, Frank Alesi, Howard Werner and Hugo Bua on October 27, 1972, filed by defendant, the United States of America.		
7/6	Appearance of Atty. James J. Gadarowski entered for defendant Frank Alesi.		
"	Answer, filed by Third-Party Defendant Frank Alesi.		
7/6	Application to Clerk for Entry of Default against Hugo Bua, third-party defendant, for failure to plead, answer or otherwise defend, filed by U.S.A. Default entered pursuant to Rule 55(a) against Third-Party Defendant Hugo Bua. Earl, C. M-12/7/72		
	Request for Entry of Default and Judgment, filed by U.S.A.		
	Affidavit for Default and Judgment, filed by U.S.A.		
	Default Judgment entered in favor of defendant and third-party plaintiff, U.S.A., against third party Defendant Hugo Bua in the amount of \$7,387.88, plus interest at 6% from June 22, 1970. Earl, C. M-12/7/72 Copies of Application, Request, Affidavit and Judgment mailed to Mr. Bua and to all counsel.		
973			
7/12	Deposition of Robert J. Smith, filed.		
"	Deposition of Frank Alesi, filed.		
"	Deposition of Howard M. Werner, filed.		
0/30	Deposition of Howard M. Werner, filed.		
11/7	Deposition of Robert Smith, filed.		
11/19	Pre-Trial List of Exhibits, filed by Third-Party Defendants		
	Frank Alesi and Robert Smith		
"	Pre-Trial Statement of Damages Claimed by Frank Alesi, filed		
	by Third-Party Defendant Frank Alesi.		
"	Pre-Trial List of Witnesses, filed by Third-Party Defendants		
	Robert Smith and Frank Alesi.		
11/19	Letter from Attorney Joseph Neiman requesting removal of		
	name of Attorney James Gadarowski who is no longer with the firm,		
	filed.		
12/3	Defendant and Third-Party Plaintiff's Supplemental Pre-Trial		
"			
"			
2/6	Pre-Trial Order, entered. The government is promptly to serve		
	and file an answer to third-party defendant Alesi's counterclaim;		
	otherwise, the pleadings are closed. Trial will be necessary to		
	resolve the parties' differences, and this case is accordingly to		
	be assigned for trial to the Court on the first available trial		
	assignment date subsequent to Dec. 31, 1973. Plaintiff is to con-		
	sider prompt retention of trial counsel. Latimer, U.S. Mag. SO		
	ORDERED. Blumenfeld, J. M-12/7/73		
2/18	Defendant and Third-Party Plaintiff's ANSWER TO Third-Party		
	Defendant Alesi's Counterclaim, filed.		
"	Defendant and Third-Party Plaintiff's Response to Third		
	Party Defendants Frank Alesi's and Robert Smith's Request for Pro-		
	duction of Documents under Rule 34, filed.		
2/26	Defendants' (Robert Smith and Frank Alesi) Motion for		
	Production of Documents "Off." Blumenfeld, J. M-12/28/73.		
7/6			
7/6	Court trial commences. Atty Dinan introduced Miss Vicky		

DATE	PROCEEDINGS	Date Order Judgment N
1971		
12/21	Complaint filed. Sum mons issued.	
12/17	Order Appointing Person (Joseph T. Ploszaj) to Serve Process, entered. Earl, C. Copy of Order together with copies of Summons & complaint, handed to Mr. Ploszaj for service. Copy of Order mailed to Plaintiff Serner. M-12/22/71	
1972		
1/6	Return of Service of indifferent person (Joseph T. Ploszaj) filed.-Summons & Complaint.	
2/14	Withdrawal of Action as to defendant Joseph J. Conley, District Director, Internal Revenue Service for the District of Connecticut, filed by plaintiff. Copies mailed to plaintiff, U.S. Atty. in New Haven and Daniel Dinan, Esq.	
2/16	Answer and Counterclaim, filed.	
2/28	Answer to Counterclaim, filed by plaintiff.	
3/20	Motion to Implead as Third-Party Defendants, Hugo Bua, Frank Alesi and Robert Smith, Notice of Motion and Affidavit of Daniel J. Dinan, filed by Defendant.	
3/27	Placed on Trial List.	
4/3	Order endorsed on Government's Motion to Implead Third-Party Defendants, as follows: "Motion granted, absent objection."	
4/14	Latimer, U.S. Magistrate. M-4/5/72. Copies mailed to all counsel. Third-Party Complaint against Hugo Bua, filed by defendant and third-party plaintiff.	
"	Third-Party Complaint against Frank Alesi, filed by Defendant and third-party plaintiff.	
"	Third-Party Complaint against Robert Smith, filed by defendant and third-party plaintiff.	
4/18	Third Party Summonses issued for service upon Third Party Defendants Hugo Bua, Frank Alesi and Robert Smith, and together with copies of same and of Third Party Complaint and Complaint, handed to the U. S. Marshal for service.	
5/2	Marshal's Return Showing Service, filed.-Summons and 3rd Party complaint.	
5/18	Marshal's Return Showing Service, filed.-Summons and 3rd Party complaint.	
5/19	Appearance of Atty. Joseph Neiman entered for defendant, Robert J. Smith.	
"	Answer, filed by Third-Party Defendant, Robert Smith.	
5/25	Marshal's Non Es Return, filed.-Summons & 3rd Party Complaint. (Hugo Bua)	
6/29	Summons issued for reservice of Third Party Complaint on Hugo Bua at Notch Road, Cheshire, Conn., and together with copies of same and of Complaint and Third Party Complaint, handed to the Marshal for service.	
7/11	Marshal's Return Showing Service, filed. - Summons, Third-Party Complaint & Complaint - Hugo Bua.	
9/25	Defendant and Third-Party Plaintiff's Pretrial Memorandum, filed.	
9/26	PreTrial Order, entered. This case is to be assigned for trial to the Court on the first available trial assignment date subsequent to November 1, 1972. A full pretrial conference is to be assigned for a date one week in advance of the trial, and the subject of possible settlement will be discussed in the course of such conference. Latimer, U.S. Magistrate. So Ordered. Newman, J. M-9/26/72 Copies mailed to all counsel.	
	(continued)	

DATE 1974	PROCEEDINGS	Dis. Or Judgment
	Cheikes as his assistant in this case. 4 Plaintiff's witnesses, including Plaintiff, sworn and testified. Plaintiff's Exhibits 1 thru 6 filed. 3rd Party Plaintiff's Exhibits 1 thru 6 marked for identification. Court adjourned at 3:15 P.M. until March 7, 1974, at 10:00 A.M. M-3/7/74 Blumenfeld, J.	
3/7	Court Trial Continues. 1 Plaintiff's witness sworn and testified. Plaintiff's Exhibits 7 & 8 filed. Plaintiff rests at 11:12 A.M. 3rd Party Plaintiff and Defendant Exhibits 1 thru 6 admitted as full exhibits; 7 & 8 filed. 1 3rd Party Plaintiff and Defendant's witness sworn and testified. Defendant and 3rd party plaintiff rests at 11:55 A.M. 3rd Party Defendant requests account sheets from Internal Revenue of payments made by Mr. Eua - Atty Dinan to secure information. 3rd Party Defendant rests at 11:57 A.M. All briefs due in 10 days. Decision Reserved. Court adjourned at 12:05 P.M. Blumenfeld, J. M-3/8/74	
3/12	Memorandum of Law, filed by Third-Party Defendants at Hartford.	
3/18	Plaintiff's Memorandum of Law, filed at Hartford.	
3/19	Letter addressed to Judge Blumenfeld from the Department of Justice, containing list of amounts assessed against the parties in the case, and Mr. Hugo Bua, filed.	
3/21	Trial Memorandum for the Defendant and Third-Party Plaintiff filed at Hartford.	
4/17	Memorandum of Decision, entered. Plaintiff's complaint against the United States is dismissed. Judgment may enter for the United States on its counterclaim against plaintiff for \$9,045.59, plus statutory interest thereon, that amount being the unpaid balance of the amount assessed against plaintiff for Hugo's failure to pay taxes in the third and fourth quarters of 1967. Judgment may enter dismissing the balance of the United States' counterclaim against plaintiff, i.e., \$2,829.91, the amount assessed against plaintiff for Hugo's failure to pay taxes during the first and second quarters of 1968. The United States' complaints against third party defendants Alesi and Smith are dismissed, etc. Judgment against the United States in the amount of \$601.61, without interest, may accordingly enter for third party defendant Alesi on his counterclaim against the United States for that amount. So Ordered. Blumenfeld, J. Copies mailed from Hartford to all counsel. M-4/22/74	
4/22	Judgment entered in accordance with above memorandum of decision. Markowski, C. M-4/24/74 Copies mailed.	
5/8	Court Reporter's Notes of proceedings held on March 6, & 7, 1974, (Trial), filed. Collard, R.	
5/17	Appearance of Atty. Martin S. Stillman entered for plaintiff.	
"	Notice of Appeal, filed by plaintiff. Copies mailed to all counsel and U.S.C.A.	
"	Bond for Costs on Appeal, filed.	

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

HOWARD M. WERNER

VS.

UNITED STATES OF AMERICA

VS.

FRANK ALESI and ROBERT SMITH

CIVIL NO. 14,783

INDEX TO RECORD ON APPEAL

DOCUMENT NO.

VOLUME I

Court Reporter's Transcript of proceedings of March 6, 1974 1

VOLUME II

Court Reporter's Transcript of proceedings of March 7, 1974 2

VOLUME III

Copy of Docket Entries A

Complaint 3

Summons 4

Withdrawal of Action against Joseph J. Conley 5

Answer of United States of America 6

Answer to Counterclaim 7

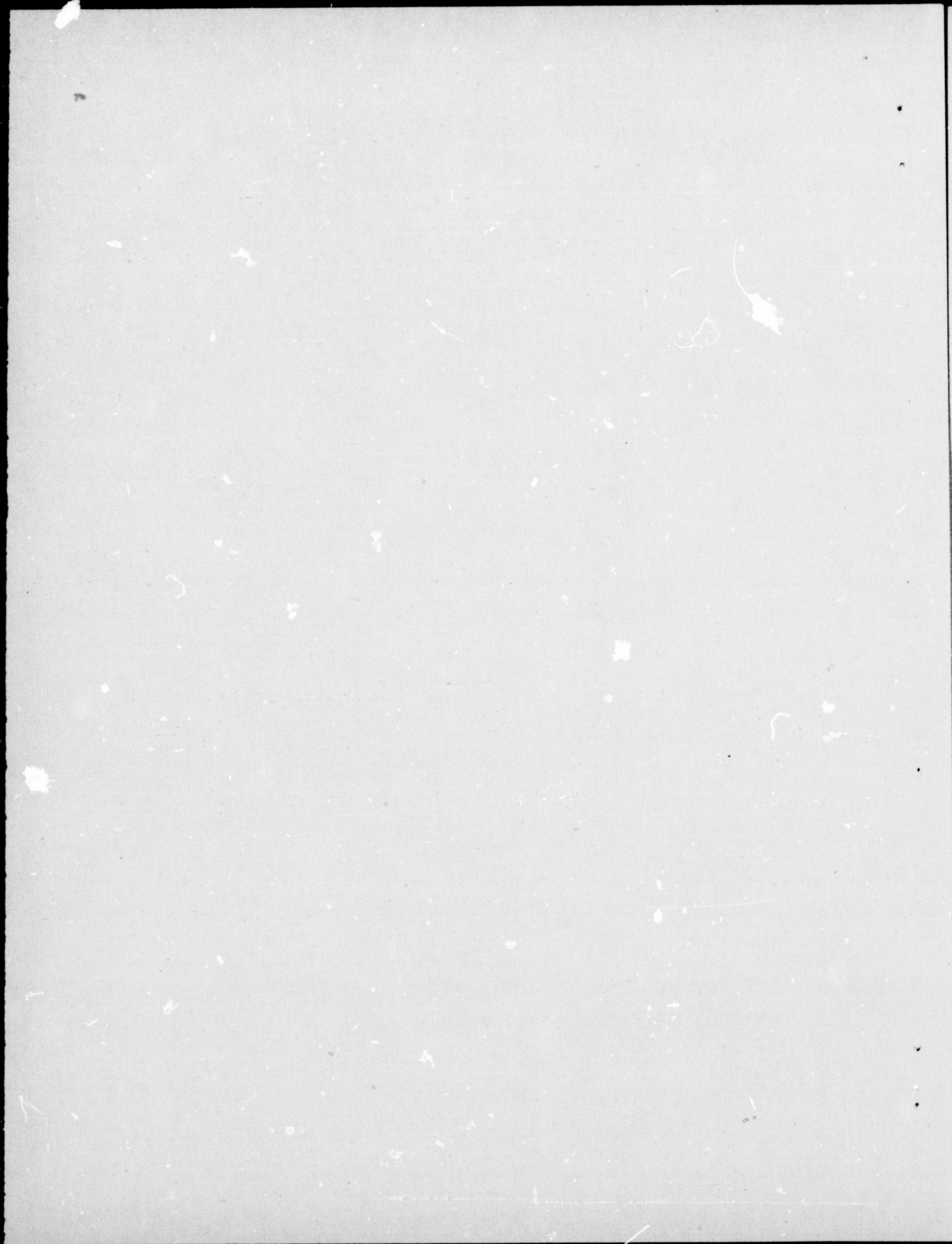
Affidavit of Daniel J. Dinan 8

Motion to Implead Third-Party Defendants with endorsement
Order thereon 9

Third-Party Complaint Against Hugo Bua 10

Third-Party Complaint Against Robert Smith 11

Third-Party Complaint Against Frank Alesi 12



Appearance of Joseph Neiman	13
Answer of Robert Smith	14
PreTrial Order	15
Notice of Taking Depositions	16
Appearance of James J. Gadarowski	17
Answer of Frank Alesi	18
Pre-Trial List of Witnesses	19
Pre-Trial List of Exhibits	20
Pre-Trial Statement of Damages Claimed by Frank Alesi	21
Pre-Trial List of Witnesses	22
Pre-Trial Statement of Damages Claimed by Plaintiff	23
Default and Judgment	24
Affidavit For Default and Judgment	25
Request For Entry of Default and Judgment	26
PreTrial Order filed December 7, 1973	27
Motion For Production of Documents	28
Defendant's and Third-Party Plaintiff's Answer to Third-Party Defendant Alesi's Counterclaim	29
Defendant and Third-Party Plaintiff's Response to Third-Party Defendants Frank Alesi's and Robert Smith's Request For Production of Documents Under Rule 34	30
Memorandum of Decision	31
Judgment	32
Appearance of Martin S. Stillman-Joseph Neiman,	33
Notice of Appeal	34
Bond for Costs on Appeal	35
Clerk's Certificate	36